CRIMINAL JURISPRUDENCE, ROMAN AND ANGLO-SAXON.

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I HAVE often heard, during my official residence in Washington, comparisons made between the Anglo-Saxon and Roman systems of criminal jurisprudence, generally very disparaging to the latter system, and this leads me to believe that our own, which is based on the Roman, is not quite well understood in this country. This, and not a desire to indulge in odious comparisons between the two systems, is my apology for writing a brief article intended to show that our system is not so defective as some believe. I think that in doing this I render a service to the good understanding between the United States and its Southern neighbors.

This subject has always had a great interest for me. Having been educated at home as a lawyer, I have desired to study and practically to compare the various systems of jurisprudence of different countries, believing this to be one of the best ways to understand the philosophy of that science. I regret, however, that the public duties which have devolved upon me during my whole life, and my long absence from home, depriving me of the opportunity of practising law in Mexico, have prevented my becoming better acquainted with all of its provisions and making a specialty of the study of jurisprudence. The same cause has prevented my studying fully the practical workings of the Anglo-Saxon system of jurisprudence, as existing in the United States. It is, therefore, with great reluctance that I approach such a difficult subject, believing, as I do, that I am not fully competent to treat it as thoroughly as I should like.

While I would not attempt to depreciate the Anglo-Saxon

system of jurisprudence, I think the Roman system is also entitled to some regard. The most remarkable of the Roman institutions, and the one which we might say survived the downfall of the Roman Empire, and the incursions of the barbarians with their feudal system, was the civil law; it contains all that was best of former ages and peoples. The advancement of old Etruria, the wisdom of Solon and Lycurgus, the principles of the legislation of Minos, and all that was of permanent value to Egypt, Phœnicia, Chaldea, and the foremost nations of the ancient times, were incorporated into the laws of the ten tables which were engraved 450 years before Christ; therefrom was developed the wonderful legal system which culminated in the institutes of Justinian in the year 534 of our era, a system which did more than anything else to assimilate to the Roman Republic the many dissimilar nations which became its provinces, and which were held together by the wonderful Roman civil law. The Roman law was really the result of freedom and free intellectual development, carried on during several centuries under the benign influence of Republican institutions. On the other hand, the common law was the natural result of the feudal or military system of the northern barbarians. The foundation, therefore, of the one is justice; the basis of the other is brute force.

It is generally considered that the corner-stone of the Anglo-Saxon criminal jurisprudence is the system of trial by jury; and yet it appears from recent researches that the jury system was not indigenous to the common law of England, but was borrowed from the Franks.* In fact, the original idea of the jury system appears to have been borrowed from the Roman law.

The advantages of this system have been much enlarged upon by different writers, both in England and America, as well as upon the continent of Europe. I do not care to criticise it, even though it seems to me, at least under existing conditions, to be open to grave objections. I will only remark that, when, eight hundred years ago, England was oppressed by a tyrannical king, the successful efforts of the English barons to wrest from him the Magna Charta, which gave to England no more than was already the common right of all the other nations of Central and Western Europe, enforced a concession which was nevertheless

* "*History of English Law before the Time of Edward I.*" By Sir Frederick Pollock and Frederick William Maitland, Cambridge, 1895, Vol. I., page 117.

justly regarded as an important step in securing human liberty. Even so, we know that the charter then granted was repeatedly violated by each and all the subsequent kings of England, down to the accession of the Stuarts. The Magna Charta was procured from King John by the barons mainly for themselves, but it inured to the benefit of the Commons, since it secured to them the right to be tried by their peers. Now, however, that the power of the Commons has so greatly overshadowed that of the barons that the two classes are rapidly merging into one, the changed conditions do not warrant any undue laudation of the great Charter. Certainly, in the United States, where all differences of class have disappeared since slavery was abolished, there is no reason to fear oppression of the people by those in authority, since the people themselves by their representatives are in power; as a consequence, trial by jury of one's peers has no longer the significance which it may be supposed to have had under Magna Charta. The arbitrary power of arrest and detention residing in the sovereign, and against which it was the purpose of Magna Charta to guard, has never existed in the United States, where the power of the President to order the arrest of a civilian exists only when the writ of *habeas corpus* is suspended in cases of rebellion, invasion, and other great public danger, and in extradition cases as provided in the respective treaties.

While I should not like to express any decided convictions on this subject, I may safely say that the conditions under which the jury system was established or adopted do not prevail at the present time, even in the country of its supposed origin; it cannot, therefore, have the importance it once had. The insufficiency of this system to punish criminals is made evident, I think, by its practical results which have unfortunately brought about what is commonly called Lynch Law, and by the fact that these in their turn have given rise to a practice which is based upon a defect in existing law, and which therefore comes to be in fact the complement of criminal proceedings under the Anglo-Saxon system. It is hardly necessary to add that lynch law is highly demoralizing, that it is open to great abuses, and that when the victim is an innocent person it amounts to a grave crime. When a community is satisfied that a crime has been committed, that a particular person is the author of that crime,

and that he cannot be punished under the regular proceedings of a common-law trial, they often take the law into their own hands and they administer swift justice in a manner that is often barbarous, but in the only way left to them. In any case the demoralizing effects of lynch law are so great, and I might say so shocking, that any system which seems to make such law necessary as a consequence of its own defects, ought to be revised so as to put an end to that terrible practice. Perhaps lynching is not only due to the imperfections of the jury system, but also to the system of procedure, that causes delays in bringing about a trial, and often to the chicane and deficient preparation of the prosecuting officer.

The jury system as applied to criminal cases is undoubtedly more favorable to the accused than to society. That it has faults is evident from the fact that some of the States of this Union, like Maryland, for instance, have enacted statutes allowing the accused to select whether he shall be tried by jury or by a judge, and this notwithstanding the constitutional provision on the subject. I regard that provision as the first step to undermine the jury system.*

But the force of example, and the great credit which Anglo-Saxon institutions have attained in the world on account of their respect for individual rights, have induced some of the American nations of Latin origin to adopt the jury system, and we have done so in Mexico. Señor Mariscal, our present Secretary of State, who lived in the United States from 1863 to 1877, as Secretary of the Legation up to 1867, and afterwards as Minister from Mexico in Washington—and who is an eminent jurist, a thorough student, and a careful observer—made a special study of the jury system in the United States, and when he went home and became Secretary of Justice under President Juarez's administration, he established, in 1869, the jury system in the Federal District of Mexico for criminal cases, changing it somewhat so as to adapt it to the peculiar conditions of the Mexican character. He provided, for instance, that a majority of the eleven jurors

* A report of the Committee of the Judiciary of the House of Representatives (No. 108, Fifty-fourth Congress, First Session), presented by Mr. Updegraff, of Iowa, on January 22, 1896, which contains several tables compiled by the Department of Justice of homicides perpetrated in the United States of which cognizance has been taken by the Federal Judicial authorities, and states the number of indictments, convictions, and acquittals, shows (Table No. 2) that in the year 1892, of 29 Judicial Federal Districts the Federal Judicial authorities took cognizance of 112 homicides, out of which came 96 indictments, 24 of the accused being convicted and 37 acquitted, only one execution having taken place.

composing our jury should render a verdict, while under the Anglo-Saxon system the unanimous vote of the twelve jurors is required. It was provided, besides, with a view to prevent the failure of justice, that if, in the opinion of the presiding judge, the verdict were clearly against the evidence, he should so report to the higher court, with a motion to set that verdict aside, and, if the higher court should sustain his opinion, a new trial should be granted, unless eight jurors had concurred in the verdict, in which case it should be final and could not be set aside. These provisions were somewhat changed by an Act issued on the 24th of June, 1891, which provides that the jury shall be composed of nine jurors, that a majority of them shall render a verdict, and that the decision of the jury shall be final if given by seven votes. Even with all these alterations in the system, I have seen cases in Mexico where criminals have gone unpunished, because through the eloquence of their attorneys the jury has been influenced in their favor.

Under the system of criminal jurisprudence prevailing in the Federal District of Mexico, all the preliminary proceedings in a criminal trial, such as the examination of the accused, the taking of testimony, etc., take place before the judge who presides over such proceedings without a jury; when this has been completed and the case is ready to be submitted, the jury is empaneled and the evidence is read to it as set forth in the record already formed; the prosecuting attorney then presents the charges, the defense is heard and the witnesses of both parties are examined and cross-examined; thereupon the jury renders its verdict, adjudging the accused either innocent or guilty, following substantially the practice under the common law of England and of the United States. In most of the Mexican States prevails the old Spanish system of criminal jurisprudence.

I often hear it asserted in this country that the proceedings under the Roman law are secret, and that the accused does not know what the witnesses have testified against him. This assertion is entirely incorrect, and often leads to very grave misunderstandings. One of the difficulties that the Spanish-American countries have to contend with at Washingtan, in cases where citizens of the United States are tried by the local judges in any of those countries, is the great difference between their criminal

legislation and procedure and the system prevailing in this country.

According to the Roman system, every criminal trial is divided into two stages. During the summary (*sumario*), which is the first, and the purpose of which is to ascertain the facts connected with the case, the testimony of the accused is taken down, sometimes without his knowing who may be the witnesses testifying against him, or the crime with which he is charged. During the plenary (*plenario*), or second stage, all the proceedings of the summary are made known; and thereafter all the proceedings are public, the accused enjoying the same rights which are guaranteed to him by the common law. To this latter statement there may be some slight exceptions, as, for instance, the fact that bail is allowed in only a few specified cases, determined by law, and never when the person may, upon conviction, be liable to bodily punishment. It would, however, take more space than is allowed in an article of this character, to state the respective advantages of the two systems, and I shall, therefore, limit myself to briefly mentioning the principal differences between them.

The secret proceedings of the *sumario* are much criticised in the United States, it being forgotten that the English common law likewise provides a secret proceeding very similar to the *sumario*. Before anyone is indicted in this country, the case is heard secretly by a grand jury, a body composed of persons who, in some cases at least, are secretly designated. The grand jury listens to such testimony as is offered, or as it may deem sufficient, without permitting the accused to be present or to know what transpires; and if in their judgment there should be sufficient ground, an indictment is found; and thereafter the public trial begins before the court. It is very difficult, of course, to make any general statement which will be accurately true with respect to all of the forty-five commonwealths which compose this country, since, as is well known, each of them has its own legislation.

In some states, as in New York, a preliminary hearing may take place before a police magistrate, who has in some petty cases power to inflict punishment, release the accused, or hold him for the action of the grand jury. Sometimes, however, no arrest is made until an indictment has been found by the

grand jury, or in cases of misdemeanor for trial by a court of judges if the defendant waives a jury.

So far, therefore, as a proceeding under one system may be said to correspond to a proceeding under the other, it may be said that the *sumario*, in countries where the Roman law prevails, corresponds practically to a grand jury indictment in Anglo-Saxon nations.

In the Latin countries testimony is taken down in writing, and, after being read to the witness, is signed by him in proof of the fact that his statements have been correctly recorded. It gives a degree of certainty to the correctness of the testimony which cannot be obtained by a stenographic report; and it renders it impossible for the judge or opposing counsel to put into the mouth of a witness language different from that which he has actually used. When the summary is ended, all the testimony is presented to the accused for his examination; and the right is then given him to cross-examine the witnesses who have appeared against him. The cross-examination is an old Spanish proceeding which we call "*careo*," and which in Spanish means that the accused is personally confronted with the witnesses in the presence of the judge, for the purpose of cross-examining them. It is therefore quite incorrect to assert that, because the *sumario*, or first stage of the trial under the Latin system, is kept secret, therefore the accused does not know anything regarding the evidence presented against him; the fact being that during the second or plenary stage of the proceeding he is fully informed of all that has been done, and is given ample opportunity to refute it, either by presenting his own witnesses or by cross-examining such as have been presented by the other side, or called by the judge.

Another right guaranteed to the accused under the Mexican law, and which in its broadest sense is unknown to the common law as such, is the right of appeal: that is to say, the right in every case to have both the law and the facts reviewed by a higher court. Under the Mexican laws this right is very broad. Our laws provide that no decision made by judge or jury condemning the accused can be executed until after it has been affirmed by a higher court. Not only is the accused given the right to appeal once, and sometimes twice, from any decision against him, but it is also made the duty of the lower court to

send the case with the record for review to the higher court in cases where the convicted person does not himself appeal. Such is the practice under the Roman and Spanish law; but in the Federal District of Mexico, where the jury system has been adopted, the case goes to the higher court only on appeal of the aggrieved party, and said appeal only affects questions of law and not the facts as stated before the jury, which cannot be controverted.

It is true that under the common law system of criminal jurisprudence the accused or his lawyer can take exceptions to points decided by the judge during the trial, and that these exceptions may be reviewed by a higher court, but this can hardly be said to be an appeal, in the sense contemplated by the Mexican law, because the decision of the appellate court is only limited to those points which may be covered by the exceptions taken at the trial. It is true that in some States, as, for instance, in New York, an appeal can now be taken which will bring before the court for review questions of fact as well as questions of law; but in so far as this procedure has been adopted, it is a departure from the strict rules of the common law and an adoption of the principles of the Roman law, since, according to the theory of the common law, a jury can make no mistake, and its findings of fact are therefore final.

Our Constitution of 1857 is so careful not to allow anybody to be kept in prison for any extraordinary length of time that Article 19 specially provides that as soon as a man shall have been arrested the judge shall immediately hold a preliminary examination, and shall within three days from the time of the arrest render his decision. If the judge shall be of opinion that there is sufficient ground for continuing the investigation the prisoner shall be remanded; otherwise he shall be set at liberty. In the first instance the judge has to sign what is called in Spanish *auto de prision formal,* meaning an order of formal commitment. In the second place, the prisoner is set at liberty. This proceeding corresponds in a measure to the grand jury investigation under the common law. As I have already stated, in some States, like New York, a committing magistrate is authorized to examine the case as a preliminary step to the investigation of the grand jury. Where such a practice prevails two examinations take place before the criminal charge upon which the accused is to be

finally tried is definitely formulated, while under our system only one investigation is made and even that must be completed within three days of the arrest.

The assertion, often heard, that American citizens tried in Mexico are not notified of the cause of their arrest; that they are not confronted with their accusers; and that they are not allowed to appear in self-defense, is in open contradiction to the express provisions of our statutes. As a matter of fact, Article 20 of our Constitution of 1857, grants the following guarantees to the accused in criminal cases:

1. That the cause of the proceeding and the name of the accuser be made known to the accused.

2. The preliminary examination of the accused must be held within forty-eight hours from the time he is placed at the disposal of the judge.

3. He may cross-examine the witnesses who testify against him.

4. Such information as the accused may need for the purpose of answering the indictment must be given him, if it be in the record.

5. He must be heard in his own defence either in person or by some attorney of his own selection, or by both, as he may elect; and in case he should have no one to appear for him he is furnished with a list of lawyers appointed for such cases, and is given the right to select as his attorney any one whom he may think proper.

We have copied in our constitution from the Anglo-Saxon system of jurisprudence the writ of *habeas corpus*, the great conquest of the Anglo-Saxons, which guarantees life and liberty to man, and which places under the control of the judiciary the otherwise arbitrary orders of those in authority; but we have gone considerably farther in this direction, and under the name of *amparo* have extended this guarantee so that it is not limited to the protection of personal life and liberty, but embraces all rights under the Constitution—including the right of personal property, even when such rights have been defined by judicial decisions. If, for instance, a man finds that his property, or any other of his constitutional rights, are interfered with, either by civil or military authority, or even by a judicial sentence of a federal or state court, he may apply to the respective federal district court having jurisdiction thereof to at once suspend the act complained

of, and finally to decide the case, either in his favor or against him, the decision always coming for revision to our Supreme Court.

Some American citizens who are tried in Spanish-American countries expect that the proceedings there will be conducted in accordance with the legislation of their own country, and, when they find it otherwise, they complain bitterly, considering the Latin proceedings as inquisitorial, outrageous, and even barbarous; and complaining that they are not tried under the laws in force in this country, as if the legislation of the United States should extend to foreign countries. My experience has shown me that this is sometimes the cause of serious difficulties and misunderstandings between the United States and some of the Spanish-American republics.*

I often hear the complaint, too, that under the Roman system the trial proceeds slowly, and it is asserted that criminal trials in the United States terminate more speedily. I am not prepared to say under which of the two systems of criminal procedure the trial is sooner brought to an end. When the trial actually begins it may take a shorter time in the United States, because, once begun, it cannot be interrupted. It often happens, however, that a long time elapses before a case is brought to trial; and this time is longer when a new trial is granted. It should be borne in mind that most of the courts in this country hold sessions but for a few weeks or months at a time, and that only during these

* As an instance of the kind of charges made against Mexico through the press by irresponsible parties, I will mention a case which recently occurred. A telegram dated at Omaha, Neb., on November 23, 1895, and published broadcast by the papers of this country, stated that Col. W. A. Paxton, of that city, had received a letter from Mac Stewart, an old employee of his, who was under sentence of death at Parral, Chihuahua, Mexico, for shooting a policeman who was trying to kill him for a trivial offence, and stated that Stewart desired to be placed in a court where he would be allowed to plead self-defence, which he pretended was not permitted under the Mexican laws. What has already been said about the Mexican criminal jurisprudence is enough to show how entirely unfounded such a statement was.

Whenever I notice any complaint of this character in the newspapers, it is my custom to communicate the same to the Mexican Government and to request an official investigation of the case, so that I may rectify the statement, if it should prove to be incorrect, or remedy the wrong before it assumes a serious aspect, if in fact there should be any real cause for complaint. In due course I generally receive an official statement which is almost always at great variance with the complaint. In this particular case, the facts in it turned out to be that Mac Stewart abused a policeman who was unarmed, and, following him to the post-office, at Parral, fired upon him without the slightest cause, killing him instantly; that, not satisfied with this, he killed the policeman's horse, and then fired upon the Chief of Police who arrested him. It further appeared that this was his second offence of this character, as he had killed before in Mexico a man named Rogers, a United States citizen. In the case of Rogers, Mac Stewart was acquitted, and upon the trial for the murder of the policeman he was allowed to plead self-defence, but failed utterly to establish it, as all the witnesses examined, including an American citizen by the name of Davis, a friend of Mac Stewart, testified that there had been no provocation on the part of the policeman, and that the accused had committed a wilful and wanton murder.—M. R.

sessions do they hear cases. In Latin-American countries, on the other hand, the courts are open and working all the year round. Morover, under the common law system the whole of the trial takes place before the jury, so that the exclusive attention of the court is necessarily devoted to that case. Only one case, therefore, can be tried at a time. In Latin-American countries a judge may try several cases concurrently, because, even where the jury system has been adopted, as it has in Mexico, a great portion of the proceedings takes place before the judge without the jury. As a consequence of this, trials in this country, by reason of the crowded condition of the dockets, are often delayed for months at a time, while in the Latin countries trials begin as soon as the prisoners are arrested.

I often hear in this country great complaints made against the Mexican prisons, which are said to be uncomfortable and sometimes considered almost filthy. It is a fact that some prisons in Mexico are in a very poor condition; that, however, is a result of the limited resources of the country. A poor country cannot afford to build magnificent prisons, yet notwithstanding that we have to contend with want of means, we are building fine penitentiaries in the City of Mexico and in the capitals of some of our States; prisons which may be advantageously compared with any to be found in this country.

Prisons cannot be as comfortable as palaces or hotels; and even in this country, with all its wealth, advancement and prosperity, prisons are sometimes very objectionable. If we had two sets of prisons in Mexico—one for Mexican citizens and the other for foreigners—and if the former were more comfortable than the latter, the citizens of this country would have reason to complain, but if we treat them on an equal footing with our own citizens, and if we give them the best we can—that is, if we keep them in the same building, provide the same food and extend to them the same conditions that we do to our own citizens—I fail to see how there can be any cause for complaint.

It should not be difficult to see which system of criminal jurisprudence is, on the whole, best calculated to do justice by ascertaining the real facts of the case, whether by a judge of long experience and proficiency in his profession, with no personal interest in the cases tried before him, or by a jury composed of men who have no experience in criminal jurisprudence. If the judge may

sometimes be derelict in his duties, so also may the jury occasionally be controlled by their emotions. If the judge fail to do his duty, his failure will be corrected by an appellate court, as all cases must be reviewed upon appeal. For the improper verdict of a jury there is often no adequate remedy. The Anglo-Saxon criminal jurisprudence is founded upon the principle that it is better to let one hundred criminals go unpunished rather than to inflict that punishment upon a single innocent person. The Latin system, while it accepts that humanitarian principle, is nevertheless better calculated to prevent the escape of a criminal unpunished.

There is a provision in our Constitution which is often misunderstood and which has given rise to the idea that we sometimes administer justice in too speedy a manner and with a complete disregard of the forms of law established for the protection of human life. Our Constitution commences with a declaration of the rights of man, taken in a great measure from the declaration of the French National Assembly during the Revolution, which in its turn was, in a great measure, taken from the Declaration of Independence of the United States. These rights secure the most ample liberty and immunity both to the person and property of the inhabitants of the country. While our Constitution was being formed, however, it was contended that on extraordinary occasions, as in case of war, or other serious danger to society, the rights guaranteed by the Constitution might stand very much in the way of inflicting needed and speedy punishment. To obviate this, the Constitution itself, in Article XXIX., provides that the rights of man, as guaranteed by that instrument, excepting such as secure his life, may be suspended for a short time, in certain emergencies, provided that suspension be upon the President's initiative and with the consent of Congress; and provided further that the suspension shall be applicable to a class; that it shall not apply to an individual; and that it shall be for a brief period. If it should be found for instance that the crime of derailing railway cars, either for the purpose of robbing them or for any other unlawful end, should become frequent, and if it should be found that the emergency called for extraordinary measures, the President would ask Congress for the suspension of the personal guarantees of this class of criminals for a limited period, say six

months; and if Congress should sanction this suspension, a summary criminal proceeding would be established, for the purpose of inflicting punishment without delay, thereby deterring others who might be disposed to commit the same crime. At the end of the period fixed, public confidence would have been restored, and there being no further need for the unusual measures adopted, the suspension of constitutional guarantees would come to an end. It will be seen that our constitution provides a speedy way for punishing criminals in extraordinary cases, without the unfortunate need which the condition of things has sometimes made necessary in this country—especially in California in former years—of establishing a committee of public safety to preserve order, a proceeding which meant that the people took the law into their own hands, acting without regard to the usual legal forms and oftentimes in a manner closely resembling Lynch Law.

When we pass from criminal to civil jurisprudence, the superiority of the Roman law is incontrovertible, and a few remarks on that subject will be pertinent in this case.*

One of the most conclusive proofs that the Roman law is not inferior to the English common law is that England, the very country where it had its birth, was obliged to establish two systems of civil jurisprudence, one the Common Law proper, which was administered through the older and ordinary courts, and the

*In an admirable address that Judge Martin F. Morris, Associate Justice of the Court of Appeals of the District of Columbia and Professor of Constitutional and International Law, Admiralty, and Comparative Jurisprudence, in the Law School of Georgetown University, District of Columbia, delivered before the graduating class in 1891, he said, referring to the subject of the common law and the Roman law (pages 30 and 31) the following:

. . . "But, however it be in criminal cases, I have no hesitation whatever, after a long experience of it, to assert that, as a mode of determination of civil causes and private controversies, the genius of man has never yet devised anything more absurd than the organized ignorance and besotted prejudices of twelve men in a jury box. The man who has a good case is always desirous to have it taken away from the determination of a jury and to submit it, to the arbitrament of a court alone—to the arbitrament, in fact, of any one other than the twelve men in the jury box; while the dishonest litigant, the unprincipled lawyer, and the speculating knave, are ever loud in their demands for trial by jury; for only upon the prejudices, the passions, the ignorance, or the corruption of juries can they base their hopes of success. This is the experience of every man who has had to do with courts of law, and it speaks volumes to the discredit of the system. Then the divided responsibility of court and jury, the necessity of immediate decision by the former of questions of law upon which appellate tribunals often deliberate for weeks and months without coming to a satisfactory conclusion, the consequent necessity of repeated trials before a final decision is reached—all contribute to render the system exceedingly unsatisfactory in its methods, no less than its results.

. . . We think we are fully justified in the assertion that there is no one feature of our jurisprudence that tends more in practice to a denial of justice than the system of trial by jury. It may, perhaps, have done well enough in a barbarous age, when judges may not have been more intelligent than juries, and may have been, in fact, the tools and minions of despotic power; but in this age and country it is nothing more than a relic of feudal barbarism."

other the Roman Law, administered through the chancery or equity courts. Law is supposed to be the perfection of justice and the best expression of human reason; it should then embrace not only equity, but the very essence of justice itself. If, therefore, a particular law or system of law fails to include equity, that law or system cannot be perfection. The very idea that equity can be a thing outside and different from law seems contradictory and absurd.

Although the chancery or equity courts were in the beginning established in England only for the purpose of trying such cases as could not be reached by the common law, or in which the processes of the common law courts afforded no adequate remedy, the Roman law came finally to be in reality the law which was intended to fill the gaps and remedy the defects of the common law. The common law courts were always very jealous of the equity courts; but after the decision of King James I., in the controversy between Sir Edward Coke, on the one side, representing the common law courts, and Lord Ellesmere, the Lord Chancellor, and Lord Bacon, on the other, representing the equity, or Roman law courts—it was established that a man might have recourse to a court of equity in many cases after his rights had been adjudicated at the common law courts. The establishment of this principle was equivalent in fact, though not in form, to giving an appeal from the courts of common law to the courts of equity, thus recognizing the superiority of the Roman over the common law system. It is true that the equity courts could not reverse the decision of the common law courts, but if in the trial of the same case an equity court reached an opposite or different conclusion, the judgment of the common law court could not be executed, and became, therefore, in fact nullified.

I am well aware that a common law lawyer will not admit that the equity courts can reverse the judgment of the common law courts, because legally and technically that cannot be done; but as a matter of fact such is the practical consequence of the system as it now exists. If a common law court, for instance, decides a case against the defendant, and if after that decision the defendant finds proofs to establish his contentions, he may still go to the equity court, present his proofs and ask that the plaintiff be enjoined from executing the judgment against

him ; and in such cases the equity court has jurisdiction to grant such an application. In a case like the one cited the equity court does not pretend technically to revise or reverse the judgment of the common law court; but by granting the injunction against its execution it practically effects its reversal ; and such a system therefore actually produces the same result as though the equity court were a court of appeals.

The American people, with their practical common sense, have remedied a great many of the defects of the common law practice in civil cases, changing it gradually to such an extent that now it can hardly be said that the English common law system, as expounded by Blackstone, is in force in the United States. It is still called the common law, but for all practical purposes it is almost superseded by the Roman law.

Even as regards the jury system, and notwithstanding the fact that this has been considered the corner-stone of common law criminal jurisprudence, some States of this country have, as I understand, changed the foundation of that system by not requiring a unanimous verdict for the conviction of the accused.

The very country which established, and for years maintained, the common law has practically superseded it by the Roman jurisprudence. In one of the acts of the British Parliament passed in the years of 1873, 1874 and 1875 the whole system of English Courts of Justice was remodelled after the systems prevailing in countries which had adopted the Roman law, and it was provided that when the rules of common law and those of equity come into conflict, the latter shall prevail. Such a provision is almost equivalent to repealing the common law itself.

The literal application of the common law, is I think, another of its disadvantages. A Common Law judge is bound to apply the law in its literal meaning, even in case that may involve a denial of justice, while a Roman law judge applies the letter of the law to the case where it fits exactly, and has some discretion to be guided by the meaning and object of its statute, rather than by its literal words when its words conflict with justice or equity.

American lawyers, in arguing cases, and judges in deciding them according to the practice under the common law system, are controlled almost entirely by precedents, and while considerations of justice and equity are sometimes indulged in,

they have legally but little weight. Such a system is very unsatisfactory, because, each case being different from every other, the decisions in the one cannot be made to exactly fit the other. Moreover, it entails a herculean task upon the lawyers and judges, making it obligatory for them to search for precedents not only in the courts of their own country, but even in those of England. With the Justices of the Supreme Court of the United States, this work is still more arduous, since they must examine and be familiar with not only all cases decided by the various Federal courts, but by all the courts of the forty-five different commonwealths which form this Union, each with its own distinct legislation, and with the Roman law also, as the State of Louisiana has adopted it, entailing besides the need of keeping a very large library. Doubtless, no public functionaries under the Federal Government have more arduous work imposed upon them. The day is not long enough to permit its completion, and I have personally known more than one who have broken down under that tremendous strain.

This condition of things shows that the common law is still in its rude and primary state, viz., still setting precedents. After sufficient precedents have been collected to form a code, they should be codified if the United States shall not previously have accepted in its entirety the Roman law. The Roman law had to pass through these different stages, and it passed them all, until it assumed the shape in which it is at present. It has been fully digested, and its principles formulated into simple rules, while the common law is yet in process of development, still passing through the primary stages.

I hope that these few observations, which have been written without preparation, will assist in dispelling the misapprehension which exists in this country regarding the criminal jurisprudence of Spanish-American nations, and in that way contribute to the better understanding between the United States and her sister Republics. A careful study of the Roman system of jurisprudence by Anglo-Saxon judges, lawyers, and statesmen has resulted in the adoption of many features of the Roman law, and a careful and comparative study of both systems would very likely lead to a conclusion in favor of an eclectic one, which would combine the best features of both.

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